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No.

Office Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL W. LASKY,

Appellant,

v.

JOHN VAN LINDT, ET AL.,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Do Sections 7915(2) and 7915(3) of the Unconsolidated Laws of New York, on their face and as applied, violate the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States, by sanctioning the deprivation of liberty interests and tangible property rights through an ex parte process which excludes persons from participating in the process, and does not afford an opportunity for hearing?

II. Does Section 7915(2) of the Unconsolidated Laws of New York (and parallel regulation, 9 NYCRR § 4001.9(a)) violate the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States, and the right to freedom of speech guaranteed by the First Amendment, both on its face and as applied?

PARTIES TO THE PROCEEDING

The Appellant Michael W. Lasky, a citizen of the United States and of the State of Maryland, was the Petitioner below. The Appellees are John Van Lindt, Chairman, Joseph O'Dea, and Bertram D. Sarafan, Individually and as Members of the New York State Racing and Wagering Board, and the New York State Racing and Wagering Board, all Respondents below.

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APPEAL FROM THE COURT OF APPEALS OF NEW YORK

JURISDICTIONAL STATEMENT

REFERENCES TO OFFICIAL AND UNOFFICIAL REPORTS

The memorandum opinion (A. 2a) of the Supreme Court, New York County, Special Term, dated June 21, 1982, has been reported as *Lasky v. Van Lindt,* 115 Misc. 2d 259, 453 N.Y.S.2d 983 (1982). The affirmance of that judgment (A. 9a) by the Appellate Division, First Department, dated November 15, 1983, is listed at 97 App. Div. 2d 986 (1983).

BASIS OF JURISDICTION

This litigation commenced in the Supreme Court, State of New York, with the filing of a Petition under Article 78 of the Civil Practice Law and Rules (CPLR) of New York to compel the Appellees to issue a thoroughbred racing owner's license to the Appellant. The Appellant also prayed for declaratory judgment in accordance with CPLR §§ 103(c), 3001. *See* Petition prayer 5 (A. 18a).[1]

On Septmber 22, 1982, the Supreme Court of the State of New York entered a Judgment (A. 7a) dismissing the Appellant's petition. That judgment was appealed to the Appellate Division of the Supreme Court, First Department, which, by "form" order dated November 15, 1983, affirmed without opinion (A. 9a). Further appeal was taken to the Court of Appeals of the State of New York, which, by "form" order dated June 14, 1984, dismissed the appeal (A. 10a).

On September 12, 1984, the Appellant filed a Notice of Appeal (A. 11a) in the Court of Appeals, State of New York, appealing the latter court's order of June 14, 1984 to this Court, along with all previous orders in the case.

As more fully appears herein, this Court has jurisdiction in this appeal by virtue of 28 U.S.C. § 1257(2). *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 605 (1975). Where, as here, the highest court of a state refuses to consider an appeal, the lower court becomes the highest court of that state for jurisdictional purposes. *Virginia Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926). All of the prerequisites to jurisdiction, as set forth in *Webb v. Webb*, 451 U.S. 493 (1981), are present here. The Appellant has included in

[1] Combining Article 78 proceedings with prayers for declaratory relief is sanctioned under New York practice. Kovarsky v. Housing & Development Administration, 31 N.Y.2d 184, 191-92 (1972); Practice Commentary by Joseph M. McLaughlin, N.Y. Cons. Laws (McKinney), Book, 7B, C7081:6.

the Appendix the Petition which initiated this case to show that *the federal constitutional claims were stated in black and white from the start,* and pursued throughout the litigation. An independent, state ground for the decisions below neither exists nor was recited at any point. In the event that this Court ultimately determines that it is without jurisdiction on appeal, this Jurisdictional Statement will, of course, be considered as a petition for writ of certiorari. *See* 28 U.S.C. § 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONST. amend. I:

> Congress shall make no law . . . abridging the freedom of speech, or of the press[.]

U.S. CONST. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law[.]

U.S. CONST. amend. XIV, § 1:

> No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.Y. UNCONSOLIDATED LAWS § 7915(2) (McKinney):

> If the state racing commission shall find that the financial responsibility, experience, character and general fitness of the applicant are such that the participation of such person will be consistent with the public interest, convenience or necessity and with the best interest of racing generally in conformity with the purposes of this act, it shall thereupon grant a license. If the commission shall find that the applicant fails to meet any of said conditions, it shall not grant such license and it shall notify the applicant of the denial.

The commission may refuse to issue or renew a license, or may suspend or revoke a license issued pursuant to this section, if it shall find that the applicant, or any person who is a partner, agent, employee or associate of the applicant, has been convicted of a crime in any jurisdiction, or is or has been associating or consorting with any person who has or persons who have been convicted of a crime or crimes in any jurisdiction or jurisdictions, or is consorting or associating with or has consorted or associated with bookmakers, touts, or persons of similar pursuits, or has himself engaged in similar pursuits, or is financially irresponsible, or has been guilty of or attempted any fraud or misrepresentation in connection with racing, breeding or otherwise, or has violated or attempted to violate any law with respect to racing in any jurisdiction or any rule, regulation or order of the commission, or shall have violated any rule of racing which shall have been approved or adopted by the commission, or has been guilty of or engaged in similar, related or like practices. [The use of the term "commission" is equivalent to New York State Racing and Wagering Board. Unconsolidated Laws §§ 7907, 8163.]

N.Y. UNCONSOLIDATED LAWS § 7915(3) (McKinney):

No license shall be revoked unless such revocation is at a meeting of the state racing commission on notice to the licensee, who shall be entitled to a hearing in respect of such revocation. In the conduct of such hearing the commission shall not be bound by technical rules of evidence but all evidence offered before the commission shall be reduced to writing, and such evidence together with the exhibits, if any, and the findings of the commission, shall be permanently preserved and shall constitute the record of the commission in such case. The action of the commission in refusing, suspending or in revoking a license shall be reviewable in the supreme court in the manner provided by the provisions of article seventy-eight of the civil practice law and rules. Such hearing

may be held by the chairman thereof or by any commissioner designated by him in writing, and the chairman or said commissioner may issue subpoenas for witnesses and administer oaths to witnesses. The chairman or commissioner holding such hearing shall, at the conclusion thereof, make his findings with respect thereto and said findings, if concurred in by two members of the commission, shall become the findings and determination of the commission. [The use of the term "commission" is equivalent to New York State Racing and Wagering Board. Unconsolidated Laws §§ 7907, 8163.]

STATEMENT OF THE CASE

As was alleged in his Petition (A. 12a) below, the Appellant Michael W. Lasky is a citizen of the State of Maryland, and President of a corporation which is engaged in the business of direct mail advertising. One aspect of the corporation's business consists of handicapping and offering racing selections for sale to the public. During August, 1981, Mr. Lasky was licensed as an owner of thoroughbred race horses by the Maryland Racing Commission, and competed in thoroughbred racing conducted in the State of Maryland under its auspices. The Maryland Racing Commission serves essentially the same function in the State of Maryland as the Appellee New York State Racing and Wagering Board serves in the State of New York, and the laws and rules and regulations of and pertaining to these bodies are, for all intents and purposes, substantively identical. Petition ¶ 6 (A. 13a).

During August, 1981, after being licensed in Maryland, the Appellant submitted an original application for a 1981 owner's license to the Appellee New York State Racing and Wagering Board at the latter's offices at Saratoga Racecourse, Saratoga Springs, New York, where racing was being conducted at that time; later, during September, 1981, at Belmont Park, located in the State of New York, the Appellant caused a horse owned by him to

be entered and compete in thoroughbred racing conducted under the auspices of the Appellee New York State Racing and Wagering Board. Furthermore, during the fall of 1981, the Appellant sought licensure as an owner of thoroughbred race horses by the New Jersey Racing Commission. The Appellant frequently competed as such in the State of New Jersey until the thoroughbred race meeting concluded at the end of the calendar year, 1981. Thus, by the end of calendar 1981, the Appellant had never sought licensure anywhere except in the States of New York, Maryland, and New Jersey, and had competed without incident in each of those States. Petition ¶¶7-9 (A. 13a-14a).

On or about November 25, 1981, having already competed as an owner in the States of New York, Maryland, and New Jersey, the Appellant received a telephone call from counsel to the Appellee New York State Racing and Wagering Board informing him, for the first time, that his "application" might be denied, because an employee or agent of the Board had suggested that the Appellant was a "tout." Immediately thereafter, counsel for the Appellant telephoned counsel for the Board questioning the threatened determination, and, on the next working day, the former wrote to the latter explaining that the Appellant was not a "tout."[2] Indeed, this very matter had been considered by both the Maryland and New Jersey authorities whose rules and regulations are substantively identical on this point with those of the Appellees. Petition ¶¶11, 12-15 (A. 14a-15a).

On or about December 21, 1981, counsel for the Board told Appellant's counsel that the application would be denied because the Board did not like the nature of certain business advertising which they attributed to the Appellant, and felt that he was a "tout." At no point did the Board or any of its representatives confront the Appellant

[2] This letter was appended to the Petition (A. 19a-20a).

with any evidence or something other than a conclusion, much less ever afford him a hearing. Petition ¶¶15-16 (A. 15a-16a).

When, by January, 1982, nothing was forthcoming from the Board, the Appellant instituted this action to compel the issuance of a thoroughbred race horse owner's license under Article 78 of the Civil Practice Law and Rules, seeking a declaratory judgment to the effect that Section 7915(2) of the Unconsolidated Laws, and 9 NYCRR §§ 4002.8, 4002.9(a), contravened the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. Accompanying the Appellant's Petition were two affidavits demonstrating, *inter alia*, that the Appellant was not a "tout." In response to the Petition and an Order to Show Cause, the Appellees filed an answer with two affidavits. The Appellees denied most of the Appellant's substantive allegations, and the testimony of the Appellees' affiants conflicted with that of the affiants for the Appellant.

After the litigation had been instituted, but prior to the filing of the answer, the Appellees issued a written Denial of Application (A. 27a), about which the Appellant's only input was standard information supplied with his license application. The denial issued by the Board is a vicious calumny, which was thereafter disseminated to all other racing jurisdictions. In this litigation the Appellant filed a request for disclosure from the Appellees in an effort to secure deposition testimony designed to explore, among other things, the assertions made on behalf of the Appellees in their answer and on their behalf by the affidavits submitted. The Appellees resisted disclosure.

Argument on the Appellant's request for disclosure was held on February 19, 1982, after which the lower court eventually rendered its decision (A. 2a) purportedly on the

merits![3] No further proceedings, disclosure or other discovery was permitted, and the court "decided" the case on conflicting pleadings and affidavits, disregarding the conflict by the simple expedient of ignoring the Appellant's contentions. An appeal followed to the Appellate Division, First Department, which affirmed without opinion (A. 9a). Thereafter, the New York Court of Appeals summarily dismissed an appeal (A. 10a), and an appeal to this court followed.

The questions sought to be reviewed here, which are closely related and often overlap, were presented to each of the courts below. The constitutionality of Section 7915(2) of the Unconsolidated Laws, both on its face and as applied, was explicitly raised in the Appellant's Petition which instituted these proceedings. *See* Petition ¶¶22-25, and prayers 4-5 (A. 16a-18a). After the Petition had been filed, the Appellees issued the Denial of Application (A. 27a) on January 25, 1982, which was incorporated into their answer, thereby injecting the closely related issue of the constitutionality of Section 7915(3) into the proceedings. These matters were the subject of argument in open court on February 19, 1982.[4] The court essentially ignored the constitutional questions concerning which the Appellant expressly sought a declaratory judgment (Petition prayer 5, A. 18a), believing them to be "unnecessary" (A. 6a).[5]

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[3] The opinion has been reported as Lasky v. Van Lindt, 115 Misc. 2d 259, 453 N.Y.S.2d 983 (1982), *aff'd*, 97 App. Div. 2d 986 (1983).

[4] As has been stated, this hearing was called over the Appellant's request for disclosure. During the discussion counsel argued the underlying constitutional issues. Much to the Appellant's surprise, in June, 1982 the court summarily disposed of the case, despite classic disputes of fact presented in the affidavits. There were no further proceedings in that court after the February 19, 1982 hearing.

[5] Regarding the argument that Section 7915(2) was unconstitutionally vague on its face, the court recited in a conclusory

The issues were briefed and argued before the Appellate Division, and presented to the New York Court of Appeals in its version of a jurisdictional statement. Neither of those courts addressed any issues in the case, both appeals being disposed of summarily via "form" orders.

THE QUESTIONS PRESENTED BY THIS APPEAL ARE SUBSTANTIAL AND REQUIRE THE PLENARY CONSIDERATION OF THIS COURT

When the opinion of the lower court was reported in the June 25, 1982 edition of the New York Law Journal, an account of the decision also appeared in a news article beginning on the first page. Presumably, the unnamed author of that news article knew nothing about the case other than what appeared in the lower court's decision. However, although only exposed to such an incomplete and selective account of events, the author was sufficiently discerning to end the news account with the following:

> If he had wanted to, Justice Maresca might have closed his decision with still another Frank Loesser song from 'Guys and Dolls' which would have more succinctly summed up his findings of fact and conclusions of law:
>
> 'Sit Down, You're Rocking the Boat.'

New York L. J. June 25, 1982, at 7, col. 2. As will be discussed herein, we are dealing with a boat that needs some rocking.

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manner that it was not (A. 5a-6a), although implicit in that statement were factual determinations made on the basis of conflicting affidavits. The court erroneously mentioned that the Appellant did not have a "'claim of entitlement'" to the license, and therefore was not entitled to a hearing. The court did not even pay lip service to the facts that: the denial was stigmatizing and directly caused the Appellant to lose status as a licensee in other States; and, the Appellant himself had been previously permitted to compete in New York (Petition ¶8, A. 14a).

This Court has previously had an opportunity to touch upon the role and practices of the Appellee New York State Racing and Wagering Board. *See Barry v. Barchi,* 443 U.S. 55 (1979). Owners of thoroughbred race horses who wish to compete in race meetings at which pari-mutual wagering is conducted in New York must be licensed by the Board. *See* Unconsolidated Laws § 7915(1); NYCRR §§ 4002.1, 4002.2, 4025.4. The Board's refusal to issue a license is judicially reviewable. Unconsolidated Laws § 7915(3); NYCRR § 4002.10. Where, as here, the Board does not permit a disfavored applicant any meaningful participation in the licensing process, there is no risk that predisposition might be shattered, or evidence favorable to the applicant adduced. Consequently, of those applicants denied licensure in this manner, only those few with the determination and wherewithal to do so will obtain judicial redress.

In his application for an owner's license, which is contained in the record, the Appellant indicated, *inter alia,* that he held an owner's license in the State of Maryland, had never been refused a license, had never been barred, ejected, or ruled off by any race track, had never been licensed by the Board, and had never been convicted of any crime. This was the only sort of information ever requested of the Appellant by the Appellees.

After this suit was filed, the Appellees issued a written Denial of Application (A. 27a) which reflected that an "investigation" of Mr. Lasky had been conducted, and recited purported facts and conclusory statements presumably made on the basis of this "investigation." It is difficult to imagine how the Appellees could claim to have conducted an "investigation" when they never spoke with the Appellant or even attempted to do so, particularly in the face of his desire to be heard. Not surprisingly, the result was a series of inaccuracies; what is shocking are the malicious statements and inaccurate conclusions

supposedly drawn from this so-called "investigation" when the Appellees: (1) labelled the Appellant a "tout"; (2) misused documents; (3) stated their dislike of lawful, commercial advertising; and, (4) directly insinuated that the Appellant was involved in criminal activity.

In support of its indictment of the Appellant, the Appellees attached to the Denial of Application what they deemed "examples of solicitations published by" the corporation of which the Appellant is President. Even taken at face value these attachments say nothing of probative value establishing any cognizable nexus between the individual Appellant and his amenability to licensure as a horse owner; in fact, they do not even mention the Appellant by name! Rather, their inclusion raises many more questions than they answer: Where did these items come from? Do the Appellees keep files on persons from whom they have never received license applications, and, if so, why? Why is an attachment dated 1974 deemed pertinent in 1982? What other items, if any, did the Appellees review? Why were the annexed items selected for inclusion, and what was omitted and why? What favorable information was available, and why was it withheld? Questions of this sort abound, and the Appellant should have had an opportunity to pursue inquiry along these lines.

The Appellees proceeded to attack and discredit the Appellant through the use of defamatory statements. Evidently, the Appellees do not like the advertising which they have attributed to the Appellant. Although this is commercial speech which is protected by the First Amendment to the Constitution of the United States, the Appellees apparently believe that their subjective dislike of advertising material can serve as a basis for denying an application to be a licensed horse owner. The mere statement of this suggestion demonstrates its implausibility and illegality.

The fact of the matter is that there is no cognizable nexus between a corporation's legitimate commercial advertising and its President's amenability to licensure. Neither is there anything improper about the advertising in question, nor have the Appellees ever attempted to regulate such material. The First Amendment implications of the Appellees' reference to these materials is discussed *infra*. For now, it is sufficient to note the Appellees' statement to the effect that the Appellant has gained "special knowledge" involving "activity which is contrary to law, or, at least, contrary to the rules of racing" (A. 27a). No basis for this subjective conclusion is identified, which is understandable because none exists. The Appellant submits, and submitted below, that no activity which is contrary to law or racing rules is involved. Certainly, if any illegal racing activity had *ever* taken place the Appellees would have been able to supply particulars. Such activity is not just impolite, it is illegal.

The Appellees continue their insinuation that the Appellant violates the law by stating that although the Appellant's "activities have apparently not been judged to be illegal by any criminal prosecutorial authority, such activities foster and present to the public a view of racing which is contrary to its best interests" (A. 28a). The clear implication of this statement is that although the Appellant has not yet been convicted of anything, it is just a matter of time before he is. It also implies that he has been accused of acting illegally, although perhaps not convicted. In fact, the Appellant has never been accused of any such illegal activity, much less been convicted. The statements by the Appellees are unfounded, blatantly defamatory, and have stigmatized the Appellant. As a legal matter, statements of this nature may not be published by a state regulatory agency in the absence of affording procedural due process to the subject of its denigration.

I.

SECTIONS 7915(2) AND (3) OF THE UNCONSOLIDATED LAWS OF NEW YORK UNCONSTITUTIONALLY SANCTION THE DEPRIVATION OF LIBERTY INTERESTS AND TANGIBLE PROPERTY RIGHTS IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS.

In *Wisconsin v. Constantineau,* 400 U.S. 433, 436-37 (1971), this Court decided that where a state attaches "a stigma or badge of disgrace" to a citizen, "procedural due process requires notice and an opportunity to be heard." The Court continued:

> Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . Only when the whole proceedings leading to the pinning of unsavory label on a person are aired can oppressive results be prevented.

400 U.S. at 437. In order to invoke constitutional protections under the Fourteenth Amendment, stigmatization must be accompanied by the loss of a tangible interest. *Paul v. Davis,* 424 U.S. 693, 708-13 (1976); *Marrero v. City of Hialeah,* 625 F.2d 499, 512-13 n.17 (5th Cir. 1980); *Quinn v. Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 446 (2d Cir. 1980). Such tangible interests have included the loss of the ability to purchase liquor in *Wisconsin v. Constantineau, supra,* the denial of the right to attend school in *Goss v. Lopez,* 419 U.S. 565 (1975), lost employment in *Quinn v. Syracuse Model Neighborhood Corp., supra,* prohibition from future employment in *United States v. Lovett,* 328 U.S. 103 (1946), failure to rehire in *Perry v. Sindermann,* 408 U.S. 593 (1972), and lost business goodwill in *Marrero v. City of Hialeah, supra.*

The Denial of Application issued by the Appellees stigmatized and caused tangible injury to the Appellant. The stigmatizing aspects of the denial include the false

aspersions of being a "tout," engaging in illegal and improper activities, allusions to conflicts of interest, and that his occupation reflects negatively upon his general fitness to be licensed. Publication took place when the Appellees caused all recognized racing authorities and State Racing Commissions in North America to be provided with the denial. Such publication was not only made, but is *required* by NYCRR § 4001.7.

The lower courts' misapprehension of the rights and interests involved in this case may be gleaned from its statement that a license is a "privilege" which may therefore be withheld almost at will (A. 6a). In *Board of Regents v. Roth*, 408 U.S. 564 (1972), this Court "fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights," and "'rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege."'" *Board of Regents v. Roth, supra*, 408 U.S. at 570 n.9.

Rather than being a "privilege," a license to own thoroughbred race horses is a statutory entitlement which cannot be denied in the absence of meaningful due process being provided. *Bell v. Burson*, 402 U.S. 535, 539, 541-42 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). The Appellant was more than a bare license applicant, as he had been permitted to compete once in the State of New York, had been licensed in Maryland and New Jersey, and had a legitimate expectation of continued licensure in New York and elsewhere.

The most obvious tangible interest which the Appellant lost through the license denial was the ability to compete as a licensed owner in New York. Although perhaps less obvious to the uninitiated, the greatest tangible loss suffered was the effect that the denial had in racing

jurisdictions other than the State of New York. Throughout North America, jurisdictions in which racing is conducted operate under a series of rules designed to give reciprocal effect to rulings made in sister jurisdictions. Typically, such rules provide that the denial of a license by the Racing Commission of any other state shall be grounds for denial in the state in question. *See, e.g.*, Maryland Thoroughbred Rules (COMAR) 09.10.01.48; Rules of the Pennsylvania State Horse Racing Commission § 163.6(d). Where there is no explicit rule on the subject this practice is followed anyway, as the reciprocity concept is firmly entrenched in racing regulation. *See, e.g.*, NYCRR § 4042.4(a),(b); The Jockey Club, Rules of Racing, 208(i), (j), (k).[6]

This reciprocity feature of which the Appellees are acutely well aware had direct ramifications for the Appellant. Although licensed as an owner in New Jersey and Maryland during 1981, when he applied for a license renewal in New Jersey in 1982, his application was not considered because he had been denied a license by the Appellees. Similarly, although he had been licensed in Maryland for 1982 prior to the issuance and publication of the Appellees' denial, thereafter the Maryland authorities sought to give reciprocal effect to the New York ruling. Furthermore, when the Appellant inquired about licensure in Pennsylvania during 1982, he was informed that the New York ruling precluded even the consideration of his application.

The lower court's insinuation that owning race horses "is not one of life's 'common occupations,'" and can therefore be summarily denied, is incorrect, as its reliance upon *Medina v. Rudman*, 545 F.2d 244 (1st Cir. 1976), is misplaced (A. 6a). Although the Appellant does not believe

[6] The effects of reciprocity in harness racing were referred to in Fitzgerald v. Mountain Laurel Racing, Inc., 607 F.2d 589, 602 (3d Cir. 1979).

that the prevalance of one's occupation per se has any bearing upon the scope of one's constitutional rights, it is simply incorrect to assert that owning racing horses is uncommon — the Appellees alone annually license thousands of owners. Evidently, the court below did not appreciate that the subject of *Medina v. Rudman* was a license to *own* a greyhound race track, and not a mere license to participate in racing, such as those held by thousands of owners and trainers.

As a constitutional matter, then, the Appellees may not be permitted to dispose of the Appellant in the cursory fashion chosen. Fundamental principles of due process, which are applicable in administrative proceedings, require notice of charges and a meaningful oppportunity to be heard. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). "[A] State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene[s] . . . Due Process' [citation omitted], and, specifically, in a manner that denies the right to a full prior hearing." *Board of Regents v. Roth, supra,* 408 U.S. at 574. As in *Perry v. Sindermann, supra,* 408 U.S. at 602-03, the Appellant here "has alleged the existence of rules and understandings" supporting his claim entitling him to a hearing.

II.

SECTION 7915(2) OF THE UNCONSOLIDATED LAWS OF NEW YORK VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT AND THE RIGHT TO FREEDOM OF SPEECH GUARANTEED BY THE FIRST AMENDMENT.

The Appellant's advertising, like that of everybody else in the United States of America, is protected under the First Amendment to the Constitution and cannot serve as

a basis for a governmental decision of the sort involved here. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530 (1980); *Linmark Assocs., Inc. v. Township of Willingboro,* 431 U.S. 85 (1977); *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976). The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — *especially his interest in freedom of speech." Perry v. Sindermann, supra,* 408 U.S. at 597 (emphasis supplied). This is especially true where, as here, it is the content of the speech which the government concerns itself with. *Suffolk Outdoor Advertising Co., Inc. v. Hulse,* 43 N.Y.2d 483, 489 (1977). By considering the commercial advertising of a corporation of which an applicant is an officer as a basis for denying a license to own race horses, the Appellees have inflicted an impermissible chilling effect upon the exercise of rights secured under the First Amendment. *See generally North Carolina v. Pearce,* 395 U.S. 711, 724 (1969); *Dombrowski v. Pfeister,* 380 U.S. 479, 487 (1965). Moreover, where a state might impinge upon free speech interests, an "opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." *Board of Regents v. Roth, supra,* 408 U.S. at 575 n.14.

In their Denial of Application, Appellees have falsely characterized the Appellant as "tout," and impermissibly concluded from some commercial advertising that the Appellant is unfit for licensure. Whatever the word "tout" has come to mean in common parlance, it has had only one meaning in the context of racing regulation. As was demonstrated in the affidavits filed in support of the Petition in this case, a "tout" acts *fraudulently* by convincing *different* people that *different* horses are going to win the same race, and collecting a fee for this "information" from the person to whom they suggested a

wager on the winning horse. A noted handicapping authority has described the methods of a tout this way:

> Most touts are good enough handicappers to know which four or five horses in a race have the best chances. They 'give' one horse to each of four or five tourists. After the race, they find the winning sucker and demand the proceeds of a $5 or $10 bet.

T. Ainslie, Ainslie's Complete Guide to Thoroughbred Racing 25 (1968).

Touting is a crime in California, and touts are excluded from attendance at race tracks, as well as participating in racing. *See* California Penal Code § 337.2; T. Ainslie, *supra*. Fraud and impropriety are accepted elements of touting in the context of racing regulation. *See United States v. Bagdasian,* 398 F.2d 971 (4th Cir. 1968); *Lewitus v. Colwell,* 479 F. Supp. 439, 444 (D. Md. 1979); California Penal Code § 337.1. The Appellant is not a "tout," and the Appellees' conclusory statement to the contrary is no substitute for the facts.

The Appellees' Regulation, taken from Unconsolidated Laws § 7915(2), provides:

> The [Board] *may* refuse to issue a license . . . if it shall find that the applicant or any person who is a partner, agent, employee, or associate of the applicant has been convicted of a crime in any jurisdiction, or is or has been associating or consorting with any person who has or persons who have been convicted of a crime or crimes in any jurisdiction or jurisdictions, or is consorting or associating with or has consorted or associated with bookmakers, touts or persons of similar pursuits or has himself engaged in similar pursuits, or is financially irresponsible, or has been guilty of or attempted any fraud or misrepresentation in connection with racing, breeding, or otherwise, or has violated or attempted to violate any law with

> respect to racing in any jurisdiction or any rule, regulation or order of the [Board] or shall have violated any rule of racing which shall have been approved or adopted by the [Board] or has been guilty of or engaged in similar, related, or like practices.

NYCRR § 4002.9(a) (emphasis supplied). From its first few words which make its application permissive ("*may* refuse"), this regulation invites a seminar on the constitutional law of vagueness, and it cannot be stretched to preclude licensure of a handicapper who publicly offers racing selections for sale in a legal manner.

While the Appellees have defined "bookmaking" to coincide with the crime described by Section 986 of the Penal Law, they have not defined "tout." *See* NYCRR § 4000.3(h). There is no reason to believe that a person engaged in a lawful occupation cannot hold a license to own thoroughbred race horses, and there is no rational basis for denying licensure to "touts" unless the interpretation of "touting" is confined to proscribed activity as it always has been in racing. Certainly, there is no nexus between one's advertising and his suitability for licensure as a horse owner, and due process requires a rational connection between qualifications and fitness for licensure. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238-39 (1957).

The conflict of interest allusions made by the Appellees are similarly without substance. There are no regulations whatsoever in this regard, and there are no regulatory prohibitions against owners disclosing whatever information they wish about their horses (or anyone else's) as they see fit. Owners are free to speak about their horses privately or publicly, may wager as they please, and do both openly and often. Furthermore, if a problem were truly perceived, outright denial would not be the last restrictive regulatory alternative.

The statute and regulation in question are also unconstitutionally vague. In *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), this Court stated:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person the opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

See also Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *Coates v. City of Cincinnati,* 402 U.S. 611, 614 (1971). Each of these dangers of vagueness is present here. Without any analysis the Appellees have attempted to label the Appellant as a "tout," one affiant on behalf of the Appellee making reference to the "modern definition" of tout! Affidavit of Jacob Iberger ¶5. This suggests that "tout" has had a different meaning, which the affiant has not seen fit to disclose. Certainly, where statutes and regulations have remained the same for many years, the fact that a particular word may have taken on different meaning in common parlance (as opposed to regulatory practice), cannot affect the legal interpretation of a prohibitive statute. This is exactly the kind of arbitrary and discriminatory enforcement that such regulations invite, and which the Constitution prohibits.

In addition to the foregoing, the Appellant has alleged that these provisions are unconstitutional as applied. The Appellant must be given the opportunity to prove his assertion that the Appellees themselves have issued licenses, usually without question, to others in similar

positions to the Appellant. Affidavit of Fendall M. Clagett ¶9 (A. 24a). This is a blatant violation of the Appellant's right to the equal protection of the laws. Thus far, the Appellant has been denied any say by the Appellees and the lower courts. He has raised serious issues, and mere denials of the allegations cannot deprive the Appellant of an opportunity to develop and prove his case.

This is an appeal taken as a matter of right from a final decision of the highest court of a state. *Huffman v. Pursue, Ltd., supra,* 420 U.S. at 605. In addition to the merits of the Appellant's case which cry out for remedial action by this Court, plenary consideration is necessary to vindicate important national policies. This Court has enunciated various doctrines which generally encourage, if not demand, presentation of federal constitutional claims in state courts where a claim involves state statutes. Different forms of this general concept were recently reviewed in *Hawaii Housing Authority v. Midkiff,* ___ U.S. ___, 104 S. Ct. 2321 (1984), including abstention and comity based upon federalism. *See, e.g., Younger v. Harris,* 401 U.S. 37 (1971); *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496 (1941).

A principal rationale for these standards is that state courts are competent to consider and give effect to federal claims, and that "[a]lmost every constitutional challenge . . . offers the opportunity for narrowing constructions that might obviate the constitutional problem. . . ." *Moore v. Sims,* 442 U.S. 428, 429-30 (1979). While this Appellant resorted to a state court in the first place primarily in order to avoid abstention-based opposition, those courts, unfortunately in this instance, neither properly considered nor resolved the constitutional issues, and nor did they offer any "narrowing construction" of the statutes involved. Especially because state courts are having more federal constitutional issues directed their way, it is more important than ever that they be made to

recognize these issues and enforce rights guaranteed by the Constitution of the United States.

A further reason for this Court's involvement is the interstate aspect of this case. By the Appellees' actions, the Appellant was stigmatized and lost tangible interests, including the right to compete as an owner in states other than New York.

The Appellant's constitutional rights, largely ignored to this point, must be enforced in this Court. Indeed, the Appellant has not, at any level below, received even the satisfaction of judicial commentary on the issues raised throughout. If plenary consideration is not afforded, this Court should summarily vacate the orders below, and remand with instructions to develop a record and resolve the constitutional issues on the law and facts as adduced.

CONCLUSION

For the foregoing reasons, the Appellant Michael W. Lasky prays that this Court assume jurisdiction of this case, and either grant plenary consideration, or summarily vacate the orders below, and remand the cause with instructions to develop a record with respect to facts pertinent to the constitutional issues present, and to render a decision on the merits on that basis.

Respectfully submitted,

GLENN E. BUSHEL,
MELNICOVE, KAUFMAN, WEINER & SMOUSE, P.A.

36 S. Charles Street,
Baltimore, Maryland 21201,
(301) 332-8500,

Attorneys for Appellant.

October 1984

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL W. LASKY,

Appellant,

v.

JOHN VAN LINDT, ET AL.,

Appellees.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

APPENDIX TO JURISDICTIONAL STATEMENT

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART 1

Index No. 1775/82
#61 of 2/19/82

MICHAEL W. LASKY,

Petitioner,

-against-

JOHN VAN LINDT, Chairman; and JOSEPH O'DEA: and BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

MEMO

MARESCA, J.:

"I've got a horse right here
his name is Paul Revere
and there's a guy who says
that if the weather's clear
can do, can do
This guy says the horse can do
If he says the horse can do
can do, can do

—(Frank Loesser's Can Do from Guys & Dolls)

On January 25, 1982, respondent New York State Racing and Wagering Board denied petitioner's application for a license as a thoroughbred race horse owner. Respondent based its denial upon its finding that, like the character Nicely-Nicely, who sang the above quoted verse, from Guys & Dolls, petitioner was a tout.

Petitioner seeks to annul the determination by the respondent Board and to compel the Board to issue a license to him.

The New York State Racing and Wagering Board has general jurisdiction over all horse racing activities and pari-mutuel betting activities in New York State, both on-track and off-track, and over the corporations, associations and persons so engaged (Unconsolidated Laws, § 7908 and § 8162). In order to compete at any thoroughbred race meeting where pari-mutuel betting is conducted, owners of thoroughbred race horses must be licensed by the Board (Rules and Regulations of the New York State Racing and Wagering Board, 9 NYCRR § 4002.2). The Board is charged with the responsibility for licensing racing participants in accordance with the criteria set forth in Unconsolidated Laws § 7915(2). That section provides, in pertinent part, that the Board:

> "may refuse to issue or renew a license, or may suspend or revoke a license issued pursuant to this section, if it shall find that the applicant . . . is consorting or associating with bookmakers, touts, or persons of similar pursuits, or has himself engaged in similar pursuits . . ."

On petitioner's original application for a thoroughbred race horse owner's license, he stated that he was president of the Baltimore Bulletin, and described his business as "direct mail advertising." Upon submission of the application to the Board, a routine inquiry commenced concerning petitioner's financial responsibility. In aid of their inquiry, the Board contacted the Thoroughbred Racing Protective Bureau (TRPB) (an industry information clearinghouse, used by many racetracks and state racing commissions throughout the country) seeking any files it may have pertaining to petitioner's activities. In addition, representatives of the Maryland Racing Commission were contacted regarding petitioner's status as a licensee, and with the New Jersey Racing Commission regarding his status there as an applicant. Thereafter, petitioner's application was reviewed, together with the TRPB's reports and other accumulated materials.

On January 25, 1982, the Board voted unanimously to deny the application, finding that petitioner is a pro-

fessional tout. The Board noted that Mr. Lasky's publications frequently convey the impression that he has *inside* information that would not be available to even the best legitimate handicapper, suggesting that this information involves activity which is, at the very least, contrary to the rules of racing. It was the Board's belief that licensing Mr. Lasky while in his current profession would create an actual or apparent conflict of interest situation that is harmful to the public's perception of racing.

Petitioner contends that he is not a "tout" within the meaning of the Unconsolidated Laws § 7915(2) and the Rules of the New York State Racing and Wagering Board (9 NYCRR § 4002.8) or within the meaning of "tout" as that term is used as a proscribed activity in the context of racing, and that the Board's determination was arbitrary, capricious and an abuse of discretion. In addition, he claims that, given the Board's construction of "tout" in § 7915(2) of the Unconsolidated Laws and implementing regulations, the statute and regulations are overbroad, vague and irrational, and violate petitioner's rights to due process and equal protection of laws as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 11 of the State Constitution.

Petitioner argues that the Board construed "tout" as a handicapper and that "in the absence of fraud and/or the offering of different selections in the same race to different customers," such construction renders the statute unconstitutional.

A handicapper is "one who rates the entries in a race before post time, who figures out the order of finish of a race beforehand. Factors include distance, weight, track condition, riders, past performances, breeding, idiosyncracies of horses, etc." (A Glossary of Racing Terms, issued by the New York State Racing and Wagering Board).

A "tout" on the other hand is "a person who obtains information on racehorses and their prospects and sells it to bettors' (The American Heritage Dictionary [Houghton-

Mifflin Co., 1980 Ed.]; see also, Websters New Twentieth Century Dictionary, Unabridged, Section Edition [1977]). Scarnes New Complete Guide to Gambling (Simon and Shuster, 1974) defines a tout as "a person who makes a living at or away from the track by trying to convince anyone who will listen that he has useful *inside* information." (emphasis supplied).

In reviewing the various representative publications authored by petitioner, the Board concluded that his publications tend to create the impression that he has *inside* information as to which horses will win particular races. A perusal of petitioner publications confirms that the materials do tend to create that impression. The Board's conclusion therefor, that petitioner is a tout as that term is consistently defined in the context of racing, and that his activities are not in the best interests of racing is neither arbitrary, capricious nor an abuse of discretion.

It is important to remember that as a sporting event, horse racing occupies a unique position among the professional sports activities which take place in this state; it is the only sport in which wagering is legal. As such, the state has a vital interest in protecting the integrity of the sport (see, *Barry v. Barchi*, 443 U.S. 55 [1979]; *Hubel v. West Virginia Racing Commission*, 513 F.2d 240 [4th Cir. 1975]) and preventing any potential for abuse. The New York State Racing and Wagering Board, having been delegated the responsibility to regulate racing and pari-mutuel betting, reviews many applications such as the one submitted by Mr. Lasky. Its decision in this case, to deny Mr. Lasky a license is consistent with its responsibilities to the sport, to the public and to the state.

Petitioner's argument that the statute and implementing regulations are unconstitutionally overbroad, vague and irrational is without merit. A fair reading of the language, as measured by common understanding and practice, clearly gives adequate warning of the type of

conduct prohibited. In addition, the legislature, by its enactment of Unconsolidated Laws, § 7915(2) was of the opinion that licensing touts was inconsistent with the public interest, convenience and necessity and not in the best interests of racing generally, and since owning, training and racing horses is not one of life's "common occupations" (see, *Medina v. Rudman,* 545 F.2d 244), it may be subject to the strictest type of regulation.

Petitioner also argues that insofar as the Board reached a determination without affording him the benefit of a hearing, he was denied due process as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, sections 6 and 11 of the State Constitution. This argument was similarly addressed by the Court of Appeals in *Fink v. Cole,* 1 N.Y.2d 488, where it was stated that the administrative machinery (with respect to processing licenses for thoroughbred racing) "was created for the purpose of determining whether a privilege — a license — should be granted to citizens engaged in the business of horse racing." Since there is no absolute right to a race horse owner's license, petitioner has no "claim of entitlement" that would require the Board to grant him a hearing (see, *Perry v. Sinderman,* 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694).

Finally, petitioner's alternate request that the action be treated as one for a declaratory judgment is unnecessary.

Accordingly, the petition is denied.

Settle Judgment.

Dated: June 21, 1982

J. S. C.

At a Special Term, Part I of the Supreme Court of the State of New York, to be held in and for the County of New York, at the Courthouse thereof, located at 60 Centre Street, New York City, New York, on the 22 day of September, 1982.

PRESENT:

HON. OREST V. MARESCA,

Justice.

JUDGMENT
Index No. 1775/82

MICHAEL W. LASKY,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

—against—

JOHN VAN LINDT, Chairman; JOSEPH O'DEA; and BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

Petitioner, having made application for judgment pursuant to Article 78 of the CPLR annulling a determination of respondent dated January 25, 1982, and the application having come on to be heard at a Special Term, Part I, of this Court on February 19, 1982,

NOW, upon the petition dated January 20, 1982 and exhibits thereto, the affidavit of Melvin A. Steinberg,

sworn to January 18, 1982, the affidavit of Fendall M. Clagett, sworn to January 13, 1982, and the affirmation of John V. Fabiani, Jr., dated January 22, 1982 (all submitted in support of the application); the answer and objections in point of law of the respondents, duly verified on the 8th day of February, 1982, the affidavit of Jacob Iberger, sworn to February 8, 1982, the affidavit with exhibits of Stephen J. Cipot, sworn to February 5, 1982 (all submitted in opposition to the application); John V. Fabiani, Jr. and Glen Bushel having appeared on behalf of petitioner; ROBERT ABRAMS, Attorney General of the State of New York (William H. Mohr, of Counsel), having appeared on behalf of respondents; and the Court (*Maresca*, J.) having rendered a written decision dated June 21, 1982,

NOW, on the motion of ROBERT ABRAMS, counsel to the respondents, it is,

ORDERED, ADJUDGED AND DECREED that the application is denied and the cross-motion is granted and that the petition is dismissed.

ENTER

J.S.C.

FORM B

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 15, 1983

Present — Hon. Theodore R. Kupferman, Justice Presiding.

Joseph P. Sullivan, Sidney H. Asch, Samuel J. Silverman, E. Leo Milonas, Justices.

18008

Michael W. Lasky,

Petitioner-Appellant,

—against—

John Van Lindt and Joseph O'Dea and Bertram D. Sarafan and the New York State Racing and Wagering Board,

Respondents-Respondents.

An appeal having been taken to this Court by the petitioner-appellant from a judgment of the Supreme Court, New York County (Orest V. Maresca, J.), entered on September 27, 1982, which denied and dismissed appellant's petition seeking to review respondents' determination dated January 25, 1982, which denied appellant's application for a thoroughbred race horse owner's license,

And said appeal having been argued by Glenn E. Bushel of counsel for appellant, and by William H. Mohr of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

Joseph J. Lucchi
Clerk.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of June A.D. 1984.

Present, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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1 Mo. No. 600 SSD 82

Michael W. Lasky,

Appellant,

vs.

John Van Lindt, Joseph O'Dea and Bertram D. Sarafan and the New York State Racing and Wagering Board,

Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the

ground that no substantial constitutional question is directly involved.

DONALD M. SHERAW,
Clerk of the Court.

STATE OF NEW YORK,
COURT OF APPEALS

Mo. No. 600 SSD 82

MICHAEL W. LASKY,

Appellant,

v.

JOHN VAN LINDT, et al.,

Respondents

NOTICE OF APPEAL

TAKE NOTICE, that the Appellant Michael W. Lasky hereby appeals to the Supreme Court of the United States from the order entered in the captioned case dated June 14, 1984, and from all previous orders in this case, entered in this Court and all lower courts.

GLENN E. BUSHEL,
MELNICOVE, KAUFMAN, WEINER
& SMOUSE, P.A.,
36 S. Charles Street,
Suite 600,
Baltimore, Maryland
21201-3060,
(301) 332-8549,
Attorney for the Appellant
Michael W. Lasky.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 11th day of September, 1984, copies of the foregoing Notice of Appeal were mailed to William H. Mohr, Esquire and Hon. Robert Abrams, Attorney General of the State of New York, Two World Trade Center, New York, New York 10047.

GLENN E. BUSHEL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PETITION

Index No. [1775/82]

In the Matter of
The Application of MICHAEL W. LASKY,

Petitioner.

For Judgment under Article 78 of the Civil Practice Law and Rules compelling the issuance of a thoroughbred racing owner's license under Section 7915 of the Unconsolidated Laws

—against—

JOHN VAN LINDT, Chairman; JOSEPH O'DEA; and, BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

TO THE SUPREME COURT OF THE STATE OF NEW YORK:

The petition of Michael W. Lasky respectfully alleges:

1. Michael W. Lasky, a citizen of the United States and of the State of Maryland, is engaged in the business of direct mail advertising.

2. The Respondent John Van Lindt is the Chairman of the Respondent New York State Racing and Wagering Board, and the Respondents Joseph O'Dea and Bertram D. Sarafan are Members thereof.

3. The Respondent New York State Racing and Wagering Board, by virtue of Section 7908 and 8162 of the Unconsolidated Laws, has general jurisdiction over horse racing activities in the State of New York, and over persons engaged therein.

4. In order to compete at any thoroughbred race meeting where pari-mutuel wagering is conducted in the State of New York, owners of thoroughbred race horses must be licensed by the Respondent New York State Racing and Wagering Board. Rules and Regulations Section 4002.2

5. The licensing of thoroughbred race horse owners is essentially a registration process for "the purpose of maintaining a proper control over race meetings." Unconsolidated Laws, Section 7915(1). Effective June 1, 1981, an original application for an owner's license requires a $50 fee, annual renewals costing $20.

6. In August, 1981, the Petitioner was licensed as an owner by the Maryland Racing Commission, Thoroughbred Racing Board, and competed in thoroughbred racing conducted in the State of Maryland under the auspices of said Commission. The latter governmental body serves essentially the same function in the State of Maryland as the Respondent New York State Racing and Wagering Board serves in the State of New York. Maryland Code, Art. 78B, Sections 1 *et seq.* Furthermore, the laws and rules and regulations of and pertaining to these governmental bodies are, for all intents and purposes, substantively identical.

7. Thereafter during August, 1981, the Petitioner submitted an original application for an owner's license to the Respondent New York State Racing and Wagering Board at the latter's office at Saratoga Race Course in

Saratoga Springs, New York, where racing was being conducted at that time. As part of the application process, the Petitioner was photographed and fingerprinted as required by law. Unconsolidated Laws, Section 7915(1).

8. During September, 1981, at Belmont Park, located in Nassau County, State of New York, the Petitioner caused a horse owned by him to be entered and compete in thoroughbred racing.

9. During the fall of 1981, the Petitioner sought licensure as an owner of thoroughbred race horses by the New Jersey Racing Commission. The Petitioner competed as such at Meadowlands Racetrack in the State of New Jersey until the thoroughbred race meeting at that plant concluded at the end of the calendar year, 1981. Thoroughbred racing is not scheduled to resume anywhere in the State of New Jersey until sometime in May 1982.

10. The Petitioner has never sought licensure anywhere except in the States of New York, Maryland and New Jersey.

11. On or about November 25, 1981, having already competed as an owner of thoroughbred race horses in the States of New York, Maryland, and New Jersey, the Petitioner received a telephone call from counsel to the Respondent New York State Racing and Wagering Board informing him, for the first time, that his "application" might be denied thereafter, because an employee or agent of the Respondent Board had suggested that Petitioner was a "tout."

12. Section 7915(2) of the Unconsolidated Laws provides in pertinent part:

> The commission may refuse to issue or renew a license, or may suspend or revoke a license issued pursuant to this section, if it shall find that the applicant, or any person who is a partner, agent, employee or associate of the applicant, has been convicted of a crime in any jurisdiction, or is or has been associating or consorting with any person who

> has or persons who have been convicted of a crime or crimes in any jurisdiction or jurisdictions, or is consorting or associating with or has consorted or associated with bookmakers, touts, or persons of similar pursuits, or is financially irresponsible, or has been guilty of or attempted any fraud or misrepresentation in connection with racing, breeding or otherwise, or has violated or attempted to violate any law with respect to racing in any jurisdiction or any rule, regulation or order of the commission, or shall have violated any rule of racing which shall have been approved or adopted by the commission, or has been guilty of or engaged in similar related or like practices. [The use of "commission" in the above statute is equivalent to New York State Racing and Wagering Board. Unconsolidated Laws, Sections 7907, 8163.]

To the same effect is Rules and Regulations Section 4001.9(a).

13. The laws and regulations governing thoroughbred racing in the States of Maryland and New Jersey are substantially identical to the provisions of Section 7915(2) of the Unconsolidated Laws quoted in Paragraph 12 above.

14. The Petitioner is not a "tout" within the meaning of Section 7915(2) of the Unconsolidated Laws, Section 4002.9(a) of the Rules and Regulations, or within the meaning of "tout" as that term is used as a proscribed activity in the context of racing.

15. Immediately following the telephone conversation referred to in Paragraph 11 above, Petitioner's counsel telephoned counsel for the Respondent New York State Racing and Wagering Board questioning the propriety of the allegedly impending decision. On the next working day the former wrote to the latter, outlining Petitioner's position. A copy of this letter, dated November 27, 1981, is attached hereto as Exhibit "A."

16. On or about December 21, 1981, counsel for Petitioner telephoned counsel for the Respondent New York State Racing and Wagering Board and was told that

the Respondent would deny the Petitioner's license application. The reasons given were that the Respondent Board Members did not like the nature of certain business advertising which they attributed to the Petitioner, and felt that he was a "tout." A written denial was to be forthcoming.

17. On or about January 4, 1982, Petitioner's counsel was informed that, barring unforeseen events, the formal denial would be issued by January 7, 1982.

18. At no time did the Respondents ever afford a hearing to the Petitioner, or even request an interview or other less formal inquiry.

19. To date, no formal acceptance or denial of Petitioner's application for a license has been issued.

20. The Respondents failed to perform duties enjoined upon them by law, exceeded their lawful jurisdiction, and rendered a determination in violation of lawful procedure which was affected by errors of law, was arbitrary, capricious and an abuse of discretion.

21. To the extent that Respondents have failed to issue an owner's license to the Petitioner they are in violation of the duties and obligations enjoined upon them pursuant to Unconsolidated Laws, Section 7915(2).

22. To the extent that Respondents based their determination upon disenchantment with lawful advertising engaged in by Petitioner in the course of his business activities, said action was illegal and in violation of Petitioner's rights guaranteed by the First Amendment to the Constitution of the United States, and Article 1, Section 8 of the Constitution of the State of New York.

23. To the extent that Respondents construed "tout" as that word is used in Unconsolidated Laws, Section 7915(2), or any Regulations implementing same, as a handicapper who publicly offers racing selections for sale in a legal manner, in the absence of fraud and/or the offering of different selections in the same race to different

customers, said statute and Regulations, and the Respondents' construction thereof, are unconstitutional, vague and irrational, both on their face and as applied, in violation of Petitioner's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Article 1, Section 11 of the Constitution of the State of New York.

24. To the extent that Respondents refused to issue an owner's license to the Petitioner under color of a portion of Unconsolidated Laws, Section 7915(2), or any Regulations implementing same, other than those referred to in Paragraph 21 above, said statute and Regulations, and Respondents' construction thereof, are unconstitutional, overbroad, vague, and irrational, both on their and as applied, in violation of Petitioner's rights to due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 1, Section 11 of the Constitution of the State of New York.

25. The Respondents denied due process of the law to the Petitioner, as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and Article 1, Sections 6 and 11 of the Constitution of the State of New York, and Unconsolidated Laws, Section 7915(3), by making an ex parte determination without benefit of hearing or confronting Petitioner, or affording Petitioner an opportunity to participate.

26. This Court has jurisdiction to entertain this Petition by virtue of Unconsolidated Laws, Section 7915(3).

27. No previous application for the judgment herein requested or the relief herein sought has been made to any other court or judge.

WHEREFORE, Petitioner respectfully prays that:

(1) Under Article 78 of the Civil Practice Laws and Rules an order be made compelling and directing the Respondents to issue a thoroughbred race horse owner's license to the Petitioner.

(2) Under Article 78 of the Civil Practice Laws and Rules a review be made of the Respondent's refusal to issue a thoroughbred race horse owner's license to the Petitioner.

(3) The Respondent's refusal to issue a thoroughbred race horse owner's license to the Petitioner be annulled, and the Respondents directed to issue such a license to the Petitioners.

(4) This Court enter a judgment or decree declaring that Section 7915(2) of the Unconsolidated Laws, and Rules and Regulations, Section 4002.8 and 4002.9(a) contravene the First, Fifth and Fourteenth Amendments to the Constitution of the United States, and Sections 6, 8, and 11 of Article 1 of the Constitution of the State of New York.

(5) To the extent that the relief sought herein is beyond the scope of Article 78 proceedings, that this Court consider such aspect of this action as being for declaratory judgment in accordance with CPLR 103(c), 3001.

(6) For such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
January 21, 1982

JOHN V. FABIANI, JR.,
KROLL, KILLARNEY, POMERANTZ & CAMERON,
500 Fifth Avenue — 15th floor,
New York, New York 10110.

GLEN BUSHEL,
MELNICOVE, KAUFMAN, WEINER & SMOUSE, P.A.,
36 South Charles Street,
Baltimore, Maryland.

LAW OFFICES OF

Melnicove, Kaufman, Weiner & Smouse, P.A.

November 27, 1981

Salvatore R. Curiale, Esquire
New York State Racing and Wagering Board
2 World Trade Center
74th Floor
New York, New York 10047

Dear Mr. Curiale:

Thank you for speaking with me on November 25 concerning Michael W. Lasky's thoroughbred owner's license. As you know, Mr. Lasky submitted his application during August, and raced thereafter at Belmont. During our conversation you told me that, at this late date, a Mr. Cipot has questioned the license, purporting to rely upon McKinney's Unconsolidated laws § 7915. In effect, I gather, Mr. Cipot contends that Mr. Lasky is a "tout" within the meaning of the statute. This is absolutely untrue, and has already been the subject of a proceeding in Maryland.

For your general background information, Mr. Lasky is a licensed owner in Maryland and New Jersey. (The New Jersey license is technically provisional until Mr. Lasky submits his fingerprints and photograph at the Meadowlands, which will occur shortly.) The Maryland Racing Commission issued Mr. Lasky a license after conducting a hearing on August 12. At that time, no one with any racing background claimed that a "tout" in the context of racing regulation was equivalent to a public selector. The uncontradicted evidence was that a "tout" in racing is one who convinces different people to wager on different horses *in the same race*, and, after the race, extracts money from the winning bettor. Naturally, this winning bettor usually continues as a prime participant, at least for awhile. The essence of touting, in a legal racing sense, is the fraud on the public, and it is this fraudulent aspect which led to its prohibition in racing.

In California, touting is a misdemeanor. Section 337.1 of the California Penal Code defines "touting" for its purposes as one "whoe knowingly and designedly *by false representation*. . . ." (Emphasis supplied.) A copy of this provision is enclosed. (By the way, Mr. Lasky makes public selections in California, is registered to do so with the California Horse Racing Board, and has never been accused of touting.) Also enclosed is an excerpt from Ainslie's Complete Guide to Thoroughbred Racing 25 (1968), which truly conveys the essence of touting in its accepted racetrack sense. The hearing before the Maryland Racing Commission was on the record, although not transcribed. If necessary, however, that can be accomplished. Furthermore, if you would like to speak with the Assistant Attorney General who represents the Maryland Racing Commission, and is familiar with the case, I would be pleased to supply his name and telephone number.

If the facts are examined, as they must be, the Racing and Wagering Board cannot legally undermine Mr. Lasky's licensure. As we discussed over the telephone, there are many more chinks in an attempt to disturb licensure on the basis of touting than the few mentioned in this letter. Please advise immediately if you would like any further information or have any questions. Mr. Lasky will, of course, cooperate with any legitimate inquiries. However, he will not countenance disparate treatment. While we all hope that it will not become necessary, Mr. Lasky is prepared to institute a federal proceeding, with pendant state claims, for injunctive and monetary relief against the appropriate authorities and persons, individually and as officials, in the event his rights are infringed.

I would appreciate being kept apprised of developments, and again encourage you to ask for any further information you may deem helpful. We will do our utmost to cooperate and serve the best interests of racing.

Very truly yours.

GEB/rd/wp

GLENN E. BUSHEL.

cc: Mr. Michael W. Lasky

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIRMATION

In the Matter of
The Application of MICHAEL W. LASKY,

Petitioner,

For Judgment under Article 78 of the Civil Practice Law and Rules compelling the issuance of a thoroughbred racing owner's license under Section 7915 of the Unconsolidated laws

—against—

JOHN VAN LINDT, Chairman; JOSEPH O'DEA: and, BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

JOHN V. FABIANI, JR., an attorney duly licensed to practice law before the courts of the State of New York and aware of the penalties for perjury, hereby affirms:

He is an attorney for the Petitioner Michael W. Lasky and makes this affirmation upon personal knowledge as well as upon information and belief in the facts and circumstances in the papers and file retained in this office for the prosecution of this Special Proceeding.

This affirmation is submitted in support of Petitioner's application for an order:

(1) Under Article 78 of the Civil Practice Laws and Rules an Order be made compelling and directing Respondent's to issue a thoroughbred race horse owner's license to the Petitioner.

(2) Under Article 78 of the Civil Practice Laws and Rules a review be made of the Respondent's refusal to issue a thoroughbred race horse owner's license to the Petitioner.

(3) The Respondent's refusal to issue a thoroughbred race horse owner's license to the Petitioner be annulled and the Respondents directed to issue such a license to the Petitioners.

(4) This Court enter a judgment or decree declaring that Section 7915(2) of the Unconsolidated Laws, and Rules and Regulations, Section 4002.8 and 4002.9(a) contravene the First, Fifth and Fourteenth Amendments to the Constitution of the United States and Sections 6, 8, and 11 of Article 1 of the Constitution of the State of New York.

(5) To the extent that the relief sought herein is beyond the scope of Article 78 proceedings, that this Court consider such aspect of this action as being for declaratory judgment in accordance with CPLR 103(c), 3001, and preliminary thereto, directing the Respondents to appear and give testimony before a Notary Public in accordance with Article 31 of the CPLR.

No prior application has been made for the relief sought herein.

The essential facts which form the basis of this special proceeding are set forth in full detail in the Petition.

Your affirmant submits that extensive disclosure of the Respondents is necessary for the proper preparation of Petitioner's case. That disclosure consists of the depositions of all Respondents. In order that Respondents may have all relevant records available for the depositions, it is suggested that the depositions be conducted at the offices of the Respondents.

WHEREFORE, your affirmant respectfully requests that the Court grant the relief requested in the Petition and direct the taking of depositions of all Respondents on

a date or dates certain to be set by this Court and such other and further relief as the Court may deem just and proper.

Dated: New York, New York
January 22, 1982

JOHN V. FABIANI, JR.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIDAVIT

Index No. [1775/82]

In the Matter of
The Application of MICHAEL W. LASKY,

Petitioner,

against

JOHN VAN LINDT, Chairman; and JOSEPH O'DEA; and, BERTRAM D. SARAFAN, Individually and as Members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

I, FENDALL M. CLAGETT, hereby make oath that I am competent to testify as to the matters stated herein, and that the following facts are true to my personal knowledge:

1. I reside at Larking Hill Farm, Harwood, Maryland 20776.

2. I hold an A.B. degree from Princeton University, conferred in 1941, and an LL.B. degree from Harvard University, conferred in 1948.

3. I have been deeply involved with thoroughbred racing since 1948, having been a breeder and licensed owner of thoroughbred race horses since 1951.

4. I have been a licensed owner of thoroughbred horses in the States of New York, Kentucky, Florida, New Jersey, Pennsylvania, Delaware, Maryland, Rhode Island, West Virginia, Massachusetts, Illinois, Michigan, and New Hampshire.

5. I have served, and continue to serve, as President of the Horsemen's Benevolent Protective Association, Maryland-Delaware-West Virginia Division, continously since 1967, save for a two-year interval during that time.

6. For the past six years, I have served as Vice President of the national Horsemen's Benevolent Protective Association.

7. Professional handicappers, like Michael W. Lasky, are not "touts." Handicapping is not touting. Handicapping is an art and a science, and is well recognized and respected by the racing community.

8. A "tout," in the sense that the word is used in racing, is one who goes from one person to another fraudulently inducing or persuading different people to place wagers on different horses in the same race.

9. Many persons who handicap horses for remuneration have been licensed owners of thoroughbred horses in the United States, including the State of New York, and I am unaware of any such person ever having been denied an owner's license on such a basis.

FENDALL M. CLAGETT

STATE OF MARYLAND
COUNTY OF ANNE ARUNDEL, TO WIT:

I HEREBY CERTIFY, That on this 13th day of January, 1982, before me, a Notary Public of said State and Anne Arundel County, personally appeared FENDALL M. CLAGETT and made oath that the matters contained in

the foregoing Affidavit are true to the best of his knowledge and belief.

ROSALIE NEUBECK,
Notary Public.

My Commission Expires: July 1, 1982

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIDAVIT

Index No. [1775/82]

In the Matter of
The Application of MICHAEL W. LASKY,

Petitioner,

—against—

JOHN VAN LINDT, Chairman; and JOSEPH O'DEA; and, BERTRAM D. SARAFAN, Individually and as members of the New York State Racing and Wagering Board; and the NEW YORK STATE RACING AND WAGERING BOARD,

Respondents.

I, MELVIN A. STEINBERG, hereby make oath that I am competent to testify as to the matters stated herein, and that the following facts are true to my personal knowledge:

1. I reside in Baltimore County, Maryland, and maintain offices for the practice of law at 305 West Chesapeake Avenue, Towson, Maryland 21204.

2. I am a member of the bar of the Court of Appeals of Maryland.

3. I am, and for the last 16 years have been, a member of the Senate of Maryland.

4. For the last three years I have served as Chairman of the Finance Committee of the Senate of Maryland, through which all legislation concerning racing is channeled and reviewed.

5. Governor Harry Hughes appointed me to a special task force on racing in 1979, and I also serve as Co-Chairman of the Joint Sub-Committee of the General Assembly studying the racing industry.

6. I have been interested in racing for over 25 years.

7. Between 1973 and 1978 I was a licensed owner of thoroughbred race horses, and also became involved in breeding. I have held owner's licenses from the States of New Jersey, Maryland, and Florida.

8. A handicapper, like Michael W. Lasky, is completely different from a "tout." Touting is a recognized fraud. A "tout" goes to different people with different names of horses in a particular race, and can be assured of supplying one person with the name of the winner. Each person is persuaded that he will have the winner, which is the basis of the fraud.

9. I am unaware of any ground upon which an owner's license could legitimately be denied to Michael W. Lasky.

MELVIN A. STEINBERG

STATE OF MARYLAND
COUNTY OF BALTIMORE, TO WIT:

I HEREBY CERTIFY, That on this 18th day of January, 1982, before me, a Notary Public of said State and Baltimore County, personally appeared MELVIN A. STEINBERG and made oath that the matters contained in

the forgoing Affidavit are true to the best of his knowledge and belief.

JACQUELINE M. FEINBERG,
Notary Public.

My Commission Expires: July 1, 1982.

NEW YORK STATE RACING AND WAGERING BOARD
DIVISION OF THOROUGHBRED RACING

In The Matter of
Michael Warren Lasky

DENIAL OF APPLICATION

The applicant, Michael Warren Lasky, a/k/a Mike Warren, William Cashem has applied for a license as an owner of thoroughbred race horses. In his license application he lists his employment position as President of the Baltimore Bulletin and describes his business as "direct mail advertising."

Investigation of Mr. Lasky indicates that at least since 1974 Mr. Lasky has authored and published a multitude of tip sheets under various names including the Baltimore Bulletin, the National Turf Club and the California Turf Club. Examples of solicitations published by Mr. Lasky are annexed. Mr. Lasky is a professional tout engaged in the activity of touting.

The material published in many instances seeks to create the impression that Mr. Lasky possesses "inside information" as to which horse will win a particular race. The clear inference of much of the published material is that this information goes beyond factors which would be available to even the best legitimate handicapper with a suggestion that the information of which he has special knowledge involves activity which is contrary to law or, at least, contrary to the rules of racing. The applicant sells

this information to his customers in the form of his selections. He typically receives a flat fee and, or a percentage of the subscribers winnings from wagers placed on his selections, if any.

Although Mr. Lasky's activities have apparently not been judged to be illegal by any criminal prosecutorial authority, such activities foster and present to the public a view of racing which is contrary to its best interests. Licensing Mr. Lasky, as an owner (or in any capacity) while he is engaged in his current occupation could result in the clothing of Mr. Lasky with a false credibility and could be taken by the public as an endorsement by this Board of an activity which the Board feels is not in racing's best interest.

Furthermore, licensing the applicant as an owner while he is engaged in his current profession would create an actual or apparent conflict of interest situation which would be harmful to the public's perception of racing. The applicant earns his living by selling his racing selections. He receives a portion of the proceeds of winning wagers placed upon those selections by his customers. Thus, he has a real monetary interest in the performance of those horses selected by him and the prices that they pay if they are successful. He is in a position to affect the odds in any given race. As a licensed owner he could be participating in races in which he has made selections recommending other horses to his clientele. Also, prior selections of horses in past races competing later against his own horses could affect the odds in those races. All in all, the potential for conflict of interest is there and readily perceivable by the public.

Accordingly, and pursuant to Unconsolidated Laws § 7915 and 9 NYCRR § 4002.8 the application of Michael Warren Lasky to be licensed as a thoroughbred race horse owner is denied in that to license him while he is engaged in his current occupation would be contrary to the best

interest of racing and that his current occupation reflects negatively upon his general fitness to be licensed.

NEW YORK STATE RACING AND WAGERING BOARD.

THOMAS C. DAVIDE,
Secretary to the Board.

Dated: New York, New York
January 25, 1982.